REMARKS

Status of Claims

Patented claims 1-12 remain pending, new claim 13 was previously cancelled, new claims 14-119 remain pending, and new claims 45, 65-69, 72, 77-79, 86, 90, 91 and 101 are amended herein.

Explanation of the support for changes to claims 45, 65-69, 72, 77-79, 86, 90, 91 and 101

Claims 45, 78, 86, 90, and 91 now recite "a pressure generator" and/or "the pressure generator." The placement of the adjective "pressure" in front of the noun "generator" was made simply to clarify, for the examiner, which of the various generators (i.e., "pressure generator," "oscillatory air flow generator," or "continuous air flow generator) are being referred to later in the claims. This is a non-narrowing amendment made only for the purposes of clarifying the claims. Col. 2, lines 9-12 of the patent sought to be reissued state, "[t]he reciprocating diaphragm delivers a generally constant **pressure** throughout the range of oscillation frequencies, providing efficacious treatment throughout the range of user-selectable frequency settings." (Emphasis added) Col. 2, lines 28-31 of the patent sought to be reissued state, "[a]lso, the positive air flow generator, in connection with a feedback system, maintains the desired peak **pressure** delivered by the bladder, independent of variations in the bladder and the patient." (Emphasis added) Col. 4, lines 40 and 41 of the patent sought to be reissued state, "[c]onduit 42 conveys changes in **pressure** from air chamber 17 to pressure transducer 43." (Emphasis added) Col. 5, lines 8-11 of the patent sought to be reissued state, "[i]n a reciprocating diaphragm system, there is no net increase in **pressure**, i.e., the air flow on the in-stroke equals the air flow on the out-stroke." (Emphasis added) Col. 5, lines 37-39 of the patent sought to be reissued state, "[t]herefore, positive air **pressure** generator 16 is used to supply positive air **pressure** to the system to compensate for the above-identified variables." Accordingly, support for use of the word "pressure" in claims 45, 78, 86, 90, and 91 is found throughout the original specification.

Claim 45 has also been amended to correct a couple of typographical errors made in the Amendment filed January 15, 2004. Specifically, the first occurrence of the phrase "the

frequency-compensation feedback system" has been amended to "a frequency-compensation feedback system" and the word "connected" has been added after the phrase "a pressure-compensation feedback system operably." These two changes simply place the associated portions of claim 45 back into the same form as originally appeared in claim 45, as filed. Thus, as to these portions of claim 45, the support in the specification mentioned in the reissue application, as filed, still applies.

Claims 65-68 and 79 have been amended to recite "the continuous air flow generator" to clarify which of the various generators (i.e., "pressure generator," "oscillatory air flow generator," or "continuous air flow generator) are being referred to in these claims. Support for "continuous air flow generator" can be found, for example, in claim 1 of the patent sought to be reissued.

Claims 72 and 77 have been amended to replace the phase "the motor speed" with "a speed of the first motor." This is a non-narrowing amendment to correct a perceived antecedent basis error. As to these claims, the support in the specification mentioned in the reissue application, as filed, still applies.

Claims 78 and 91 have been amended to recite "a bladder that is positioned about a person and that has an air leakage associated therewith" and to recite "the continuous air flow generator being pneumatically coupled to the bladder and operating continuously to compensate for the air leakage." Support for these amendments can be found in the patent sought to be reissued at col. 2, lines 27 and 28, which state, "[t]he positive air flow generator compensates for any leakage in the system, including the hoses and bladder" and at col. 5, lines 29-40, which state:

> For example, bladder 2 typically leaks air at a variable rate that is difficult to model. The amount of air leakage is influenced by many factors, including variations in production of the bladder, age, use, and other factors.
>
> Also, tubes 3 and the various connections within the system may also leak. Additionally, the air pressure delivered to bladder 2

> must be varied due to the repeated inhalation and expiration of the user during treatment, and also due to the size of the particular user. Therefore, positive air pressure generator 16 is used to supply positive air pressure to the system to compensate for the above-identified variables.

Claim 78 has also been amended to correct a typographical error made in the Amendment filed January 15, 2004. Specifically, the phrase "the pressure generator providing a positive and an oscillatory pressure" has been amended to "the pressure generator providing a positive pressure and an oscillatory pressure." This change simply places the associated portion of claim 78 back into the same form as originally appeared in claim 78, as filed. Thus, as to this portion of claim 78, the support in the specification mentioned in the reissue application, as filed, still applies.

Claim 90 has been amended to correct a typographical error made in the Amendment filed January 15, 2004. Specifically, the phrase "about ambient pressure" has been amended to "above ambient pressure." This change simply places the associated portion of claim 90 back into the same form as originally appeared in claim 90, as filed. Thus, as to this portion of claim 90, the support in the specification mentioned in the reissue application, as filed, still applies.

Claim 101 has been amended to recite "a bladder that is positioned about a person and that has an air leakage associated therewith" and to recite "maintaining continuous communication of the positive air pressure with the bladder to allow repeated inhalation and expiration of the person and to compensate for the air leakage; and continuously maintaining the positive air pressure with the generator to a second predetermined value irrespective of the repeated inhalation and expiration of the person and independent of the air leakage." Support for these amendments can be found in the patent sought to be reissued at col. 2, lines 27 and 28, which state, "[t]he positive air flow generator compensates for any leakage in the system, including the hoses and bladder" and at col. 5, lines 29-40, which state:

> For example, bladder 2 typically leaks air at a variable rate that is difficult to model. The amount of air leakage is influenced by many factors, including variations in production of the bladder, age, use, and other factors.

> Also, tubes 3 and the various connections within the system may also leak. Additionally, the air pressure delivered to bladder 2 must be varied due to the repeated inhalation and expiration of the user during treatment, and also due to the size of the particular user. Therefore, positive air pressure generator 16 is used to supply positive air pressure to the system to compensate for the above-identified variables.

Further support for the amendment to claim 101 can be found at col. 6, lines 2-8 which state, "[f]irst, positive air flow generator 16 dynamically adjusts the peak pressure in air chamber 17 to provide a consistent peak pressure based on the user selected peak pressure, independnent of leaks in the system, size of the user, condition of the bladder, and the repeated inhalation and expiration of the user."

Claim Objections

The examiner objected to claims 45-100 based on a perceived antecedent basis issue in connection with the phrase "the generator." Claims 45, 78, 86, 90, and 91 now recite "a pressure generator" and/or "the pressure generator," and claims 65-68 and 79 now recite "the continuous air flow generator." Thus, the phrase "the generator" no longer appears in any of claim 45-100. Accordingly, withdrawal of the objection to claims 45-100 is respectfully requested.

Claim Rejections

The examiner rejected claims 78-89 and 91-119 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 3,878,839 to Norton et al. in view of U.S. Patent No. 4,930,498 to Hayek and U.S. Patent No. 3,896,794 to McGrath. Independent claims 78 and 91 have each been amended to recite, among other things, "a bladder that is positioned about a person and that has an air leakage associated therewith" and "the continuous air flow generator being pneumatically coupled to the bladder and operating continuously to compensate for the air leakage." The examiner states in the Office Action that Norton appears to be silent as to whether or not the pressurized source 79 is a continuous air flow generator. Recognizing the deficiency of Norton, the examiner relies upon McGrath as teaching a continuous air flow generator. However, the passage from McGrath cited by the examiner as teaching a continuous air flow

generator is taken out of context. The full paragraph from McGrath (at col. 3, lines 6-14), which is associated with the passage mentioned by the examiner, is as follows:

> As already mentioned, these pulses are applied to the respective terminals of solenoid 58, the setting pulses serving to switch the valve 6 into the position in which the source 2 applies a continuous stream of gas under pressure to device 12 through pressure regulator 8. When a reset pulse is received, the valve is returned to the illustrated position in which no further pressurized gas is supplied to regulator 8, the conduit upstream thereof being vented to atmosphere.

Thus, in McGrath, the pressure source 2 only supplies pressure to the remainder of McGrath's system after the solenoid 58 receives a setting pulse and before the solenoid receives a resetting pulse. As best shown in Fig. 3 of McGrath, the period of time between each of McGrath's setting pulses (i.e., the positive going pulses) and McGrath's resetting pulses (i.e., the negative going pulses) is 10 seconds, whereas the period of time between each of the resetting pulses and the next setting pulse is 100 seconds to 120 seconds. That is, McGrath's source 2 is blocked from applying pressurized gas to the remainder of McGrath's system for 100 to 120 seconds for each 10 second period that source 2 is able to apply pressurized gas to the remainder of McGrath's system. Therefore, most of the time, McGrath's source 2 is not pneumatically coupled to boots 38 because solenoid 58 closes McGrath's valve 6. In such an arrangement, source 2 can hardly be thought of as a "continuous air flow generator . . . pneumatically coupled to the bladder and operating continuously to compensate for the air leakage" as required by amended independent claims 78 and 91. Hayek was proffered by the examiner as teaching a piston which includes a diaphragm. Hayek neither discloses nor suggests a "continuous air flow generator being pneumatically coupled to the bladder and operating continuously to compensate for the air leakage" as recited in independent claims 78 and 91. Accordingly, independent claims 78 and 91, along with claims 79-89 which depend either directly or indirectly from claim 78 and claims 92-100 which depend either directly or indirectly from claim 91, are in condition for allowance and such action is respectfully requested.

Claim 101 has been amended to recite, among other things, "a bladder that is positioned about a person and that has an air leakage associated therewith" and to recite "maintaining

continuous communication of the positive air pressure with the bladder to allow repeated inhalation and expiration of the person and to compensate for the air leakage; and continuously maintaining the positive air pressure with the generator to a second predetermined value irrespective of the repeated inhalation and expiration of the person and independent of the air leakage." Norton, McGrath, and Hayek, taken alone or in combination, neither disclose nor suggest "maintaining continuous communication of the positive air pressure with the bladder to allow repeated inhalation and expiration of the person and to compensate for the air leakage" as recited in claim 101. Accordingly, claim 101, along with claims 102-119 which depend either directly or indirectly from claim 101, are in condition for allowance and such action is respectfully requested.

Final Remarks

The examiner's indication that claims 1-12 remain patentable and that claims 14-77 and 90 are allowable is noted with appreciation. All claims pending in this application are believed to be in condition for allowance and such action is respectfully requested.

As explained in the March 3, 2004 voicemail from the undersigned to the examiner, the related litigation referenced by the examiner in the February 11, 2004 Office Action has now been terminated. Faxed herewith, for the examiner's convenience, is a copy of the STIPULATION OF DISMISSAL WITH PREJUDICE that was filed with the court to terminate the litigation and the ORDER OF DISMISSAL WITH PREJUDICE that was signed by the judge presiding over the litigation. The examiner indicated in a reply voicemail to the undersigned on March 3, 2004 that the examiner would attempt to render a decision regarding entry of this Amendment and allowance of this application prior to the March 11, 2004 deadline for either filing an Appeal or a Request for Continued Examination.

If there are any questions or comments that would speed prosecution of this patent application, the examiner is invited to call the undersigned at (317) 231-7341.

It is respectfully requested that, if necessary to effect a timely response, this paper be considered as a Petition for an Extension of Time sufficient to effect a timely response and that

shortages in fees, if any, be charged, or any overpayment in fees credited, to the Account of Barnes & Thornburg, Deposit Account No. 10-0435 with reference to file 7175-74108.

Respectfully submitted,

BARNES & THORNBURG

Ronald S. Henderson

Ronald S. Henderson
Attorney Reg. No. 43669

Indianapolis, Indiana
317-231-7341

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Advanced Respiratory, Inc. Plaintiff, vs. Electromed, Inc., Defendant.	Civil Action No. 00-2646 DWF/SRN **STIPULATION OF DISMISSAL WITH PREJUDICE**

The above entitled matter having been fully settled and compromised between the parties, it is hereby stipulated and agreed, by and between the undersigned, as counsel for the respective parties, that the above-entitled matter shall be dismissed with prejudice, each party to bear its own costs, expenses and attorneys' fees. It is further stipulated that the Court may retain jurisdiction solely for the purpose of enforcing the Settlement Agreement between the parties dated September 5, 2003, and that the Court may enter an order of dismissal pursuant to this Stipulation.

Dated: Sept. 8, 2003.

BRIGGS AND MORGAN, P.A.

By _____
John B. Lunseth II (#065341)
2400 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 977-8400

and

Richard O. Bartz (#5174)
Richard J. Bartz (#166364)
Bartz & Bartz, P.A.
Southdale Office Centre
6750 France Avenue South, Suite 350
Edina, Minnesota 55435-1983
Telephone: (952) 920-3959

Attorneys for Defendant Electromed, Inc.

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DEPUTY CLERK

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Dated: Sept. 8, , 2003.

OPPENHEIMER, WOLFF & DONNELLY, LLP

By Edward M. Laine
Edward M. Laine (#59535)
Plaza VII
Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
(612) 607-7000

Attorneys for Plaintiff Advanced Respiratory, Inc.

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation for Dismissal between counsel for the parties hereto, it is hereby **ORDERED** that the above-entitled mater is hereby dismissed with prejudice, each party to bear its own costs, expenses and attorneys' fees. It is further **ORDERED** that this Court shall retain jurisdiction solely for the purpose of enforcing the Settlement Agreement between the parties dated September 5, 2003.

Dated: September 10, 2003

Honorable Donovan W. Frank
Judge of United States District Court

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